UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Eolas Technologies Incorporated and The Regents Of The University Of California, *Plaintiffs and Counterdefendants*, vs. Adobe Systems Inc.; Amazon.com, Inc.; CDW Corp.; Citigroup Inc.; The Go Daddy Group, Inc.; Google Inc.; J.C. Penney Corporation, Inc.; Staples, Inc.; Yahoo! Inc.; and YouTube, LLC, *Defendants and Counterclaimants*.	Civil Action No. 6:09-CV-446-LED JURY TRIAL DEMANDED

DEFENDANTS' OBJECTION TO PLAINTIFFS' AMENDED JURY INSTRUCTION AND PROPOSED AMENDMENT [DKT. 1335]

In view of Plaintiffs' filing at 11 pm tonight with less than a half hour notice, Defendants object to Plaintiffs' proposed amendment at this hour and propose their own amendment.

Section 4.1

Plaintiffs' proposed amendment in Section 4.1 is objectionable because it misstates the law by stating that the Patent Office considers "the prior art" without distinguishing between original examination proceedings and reexaminations. This distinction is critical and plaintiffs' arguments have created the risk for juror confusion and consequent unfair prejudice on this very distinction. Sections 301 and 302 of the Patent Code, and 37 CFR 1.552, all provide that reexamination is limited to patents and printed publications. It does not include other forms of prior art such as prior invention under Section 102(g) and public use under Section 102(b).

This concern would be addressed with the following instruction that in any event defendants believe is necessary to properly explain the law and the relevant legal rules to the jury given the trial record:

"The rules for examination of a patent application before the issuance of a patent are different from those that govern a patent reexamination. During an original examination, only the applicant is permitted to participate in the process. In the reexamination, parties other than the applicant can, and did initiate the proceeding, but were not permitted to participate beyond that. In addition, while in the original patent examination the Patent Office can consider prior art in general, in reexamination printed publications and patents can be considered, but public uses and prior inventions cannot."

Section 5.1

Plaintiffs' proposed amendment to Section 5.1 is objectionable because instructing on the Constitutional basis for patent law again is unnecessary and also because of the statement that

you may not invalidate a patent "merely because you believe the invention should be dedicated to the public." This proposed amendment is argumentative, inaccurate and confusing. If a juror believes the invention is invalid because it was dedicated to the public by third parties as prior art, that would be a proper basis to invalidate the patent. The proposed amendment's statement of the purpose of the patent system and how the system achieves that purpose is also inaccurate, incomplete, and prejudicial.

Dated: February 8, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this the 8th day of February, 2012.

/s/ Andrew L. Perito
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